WILLIAM PERLMAN

IBLA 85-784 Decided April 7, 1987

Appeals from two decisions of the San Juan Resource Area Office, Bureau of Land Management, assessing civil penalties for the continuous disregard of orders relating to conditions on Indian leases MOO-C-1420-1528 and MOO-C-1420-1551.

Affirmed.

1. Oil and Gas Leases: Civil Assessments and Penalties

> A BLM decision imposing civil penalties pursuant to the Federal Oil and Gas Royalty Management Act for continued noncompliance with an order to eliminate low spots in meter hoses will be affirmed on appeal where the record shows the lessee failed to comply with the order, and the order was designed to ensure the accuracy of the meter readings in accordance with the terms of the lessee's application for permit to drill.

APPEARANCES: Julia Hook, Esq., and Susan N. H. Dixon, Esq., Denver, Colorado, for appellant; Lowell L. Madsen, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

William Perlman has appealed two decisions by the San Juan Resource Area Office, Bureau of Land Management (BLM), dated June 7, 1985, assessing civil penalties against him pursuant to 43 CFR 3163.4-1(b) (1984) for "continuous disregard of orders" requiring that meter hoses on Southern Ute Wells No. 23-2 and 26-1, located on Indian leases MOO-C-1420-1528 and MOO-C-1420-1551, respectively, be shortened to prevent the collection of fluid in low spots. 1/

By letter dated March 8, 1985, BLM ordered appellant to shorten the meter hoses located at wells No. 23-2 and 26-1, allowing 30 days for the

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1/ On Sept. 12, 1986, the Board issued an order consolidating this case with four other appeals filed by Perlman. On March 18, 1987, the Board issued a decision disposing of those four appeals, noting that this case would be dealt with separately. William Perlman, 96 IBLA 181, 182 n.1 (1987).

corrective action. On April 12, 1985, a follow-up inspection of the wells showed that compliance had not been accomplished. Accordingly, BLM issued a notice of incidents of noncompliance (INC) regarding each well, citing appellant's failure to comply with the March 8 order, and imposing an assessment of $ 250 for each violation in accordance with 43 CFR 3163.3(a) (1984). These INC's dated April 12, 1985, required compliance within 20 days.

Subsequent inspections on May 17, May 29, and June 3, 1985, showed lack of compliance on appellant's part. Consequently, BLM issued the June 7, 1985, decisions imposing Federal Oil and Gas Royalty Management Act (FOGRMA) civil penalties under 43 CFR 3163.4-1(b) (1984). 2/

One BLM decision established the gravity of the violation at well No. 23-2 as moderate and assigned 41 penalty points. Based on Penalty Conversion Table A, found at 43 CFR 3163.4-1(e)(5) (1984), BLM imposed a penalty of $ 79 a day, beginning on receipt of the letter-decision or 5 days from mailing, whichever came first, and continuing until compliance with the March 8, 1985, order was achieved. BLM notified appellant that if the violation was not corrected within 40 days, the penalty would increase to $ 790 per day starting with receipt of the notice, not to exceed 60 days, at which time lease cancellation proceedings would be initiated. BLM's other decision regarding well No. 26-1 is similar, except two other INC's issued after February 1, 1983, were taken into account in increasing the penalty points to 43. Again, under Penalty Conversion Table A, a penalty of $ 86 a day was imposed, with an increase in the penalty to $ 860 per day to take effect if the violation was not corrected in 40 days. 3/

Both decisions provided the following notice regarding administrative review of the civil penalty: "A person charged with a violation and served with a notice of civil penalty may request a technical and procedural review under 43 CFR 3165.3 within ten working days of receipt of this notice."

BLM issued the decisions imposing civil penalties in accordance with 43 CFR 3163.4-1(b) (1984), which sets forth the consequences "[w]henever a lessee fails or refuses to comply with any applicable requirements of the Federal Oil and Gas Royalty Management Act, [30 U.S.C. §§ 1701-1757 (1982)], any mineral leasing law, any rule or regulation thereunder, or the terms

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2/ We note that on Feb. 20, 1987, the Department published final rulemaking, with an effective date of Apr. 21, 1987, substantially revising the regulations in 43 CFR 3160. 52 FR 5384.

3/ By letter dated July 8, 1985, BLM informed appellant that based upon a field meeting it was "discontinuing [the] daily assessment on Wells 26-1 and 23-2 for failure to remove gaps in the meter hoses. This is effective as of June 21, 1985." As the result of a field meeting between representatives of BLM and appellant, the violations at wells 26-1 and 23-2 were "temporarily rectified * * * by tieing up the hoses with baling wire to the frame of the meter cage." BLM suggested that appellant "complete the job with something more permanent."

of any lease or permit issued thereunder." Subsection (b)(7)(ii) of 43 CFR 3163.4-1 (1984) established procedures for administrative review of an assessment of FOGRMA civil penalties:

> A person charged with a violation and served with a notice of civil penalty may request a technical and procedural review under § 3165.3 of this title within 10 working days of receipt of the notice. Such review shall be limited to the issues of whether a violation actually existed and, if so, whether the gravity attached to the violation was appropriate, and whether a reasonable abatement period was prescribed. Within 30 days of service of a notice of penalty, or within 15 days of receipt of the decision on the technical and procedural review, whichever is later, the person charged shall either request a hearing on the record or pay the civil penalty. A request for a hearing shall be filed within the time allowed in the office of the State Director having jurisdiction of the lands covered by the lease. No civil penalty shall be assessed under this section until the person charged with the violation has been given the opportunity for a hearing on the record under Part 4 of this title.

Under 43 CFR 3163.4-1(b)(7)(ii) (1984) a person charged with a violation and served with a notice of civil penalty "may" request technical and procedural review within 10 days of receipt of the notice. Requesting such review is not mandatory. However, failure to seek such review in a timely manner constitutes a waiver of that review. In this case Perlman did not avail himself of the opportunity for technical and procedural review of the June 7, 1985, decisions.

That regulation further provides that one served with a notice of civil penalty "shall" either request a hearing or pay the civil penalty within 30 days of receipt of such notice or, although not applicable in this case, within 15 days of receipt of the decision on technical and procedural review. The regulation requires the request for hearing be filed in the office of the State Director having jurisdiction of the lands covered by the lease. Moreover, the regulation states that "[n]o civil penalty shall be assessed under this section until the person charged with the violation has been given the opportunity for a hearing on the record under Part 4 of this title."

Within 30 days of receipt of the decision in question Perlman filed with the Colorado State Director a "Notice of Appeal of Decisions." Upon receipt of that "Notice of Appeal," the Colorado State Office forwarded the case files to this Board. Since the decisions in question provided for imposition of FOGRMA civil penalties in accordance with 30 U.S.C. § 1719 (1982), 43 CFR 3163.4-1(b)(7)(ii) was applicable. Arguably, the State Office should have considered Perlman's "Notice of Appeal" to be a request for hearing and forwarded the case file to the Hearings Division, Office of Hearings and Appeals, for assignment of an Administrative Law Judge to conduct a hearing on the record. However, Perlman raised no objection to the transmittal of the case file to the Board and, in fact, requested that the

case be consolidated with four other appeals pending before the Board (IBLA 85-752, -753, -754, and -761). See note 1, supra. In that regard we must consider Perlman's action to have been a waiver of his opportunity for a hearing on the record on the imposition of FOGRMA civil penalties. Such a waiver does not preclude review by this Board, however.

The underlying violations in this case are the same as certain violations considered by the Board in William Perlman, 96 IBLA 181 (1987), failure to eliminate low spots in meter hoses. Therein, the Board addressed appellant's assertion that he had complied with BLM's March 8, 1985, order by raising the meters:

> [A]ppellant's action was not sufficient to meet BLM's desired objective: prevent collection of fluids in meter hoses by removing low spots or loops. Appellant has introduced no evidence which persuades us that the conditions stated on the face of each INC were not those encountered by BLM at the time of inspection.

Id. at 188.

Herein, with its answer to appellant's statement of reasons, BLM submitted a series of photographs which show that low spots in the meter hoses for the subject wells existed on June 18, 1985, contrary to the March 8 order and subsequent INC's. Appellant has introduced no evidence to indicate that the conditions stated on the face of the INC's were not those encountered by BLM at the time of its follow-up inspections. Thus, clearly Perlman failed to comply with BLM's orders, and the assessment of $ 250 pursuant to 43 CFR 3163.3(a) (1984) was proper.

The question raised by this appeal is whether FOGRMA civil penalties were appropriate. Perlman first argues that such penalties are not applicable because he complied with the March 8, 1985, order. We have disposed of that argument, supra. Next, Perlman charges that FOGRMA civil penalties may be imposed only in accordance with 43 CFR 3163.4-1(b) (1984) where the lessee "fails or refuses to comply with any applicable requirements of the Federal Oil and Gas Royalty Management Act, any mineral leasing law, any rule or regulation thereunder, or the terms of any lease or permit issued thereunder." He argues that nothing in FOGRMA, the mineral leasing laws, any rule or regulation promulgated pursuant to the mineral leasing laws, or the terms of the leases involved requires him to shorten meter hoses or raise the meter houses at the wells in question. BLM did not respond to this argument.

The regulations in effect at the time of the June 7, 1985, decisions provided at 43 CFR 3163.4-1 (1984):

> § 3163.4-1 Administrative penalties
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> (a) Mineral Leasing Act. (1) Whenever a lessee fails to comply with any provisions of the lease, the regulations in this part, applicable orders or notices, or any other appropriate orders of the authorized officer, the authorized officer shall give the lessee notice in writing to remedy any defaults or violations.

> (2) If there is a failure to complete the necessary remedial action within the time and in the manner prescribed by the notice, the lessee shall be liable for a penalty of not more than $ 500 per day for each day the violation continues beyond the date specified in the notice through the 20th day of such noncompliance.
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> (b) Federal Oil and Gas Royalty Management Act.
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> (1) Whenever a lessee fails or refuses to comply with any applicable requirements of the Federal Oil and Gas Royalty Management Act, any mineral leasing law, any rule or regulation thereunder, or the terms of any lease or permit issued thereunder, the authorized officer shall notify the lessee in writing of the violation, unless the violation was discovered and reported to the authorized officer by the liable person or the notice [w]as previously issued under paragraph (a) of this section. If the violation is not corrected within 20 days of such notice or report, or such longer time as the authorized officer may agree to in writing, the lessee shall be liable for a civil penalty of up to $ 500 per violation for each day such violation continues, dating from the date of such notice or report. [Emphasis added.]

In this case Perlman failed to comply with the March 1985 written order issued by BLM. Under 43 CFR 3165.3 (1984), Perlman had the right to seek technical and procedural review of that order as it related to the well in question. He did not. In fact, he believed he had complied with that order by raising the meters. In April 1985, BLM issued the INC's stating that Perlman had failed to comply with the March 1985 order and that failure to comply with the INC's would result in an assessment under 43 CFR 3163.3(a) (1984) and might result in civil penalties under 43 CFR 3163.4. Perlman was given 20 days within which to comply. Again Perlman had the right to seek technical and procedural review pursuant to 43 CFR 3165.3 (1984). Again, he did not. Finally, when notified in the June 1985 decisions that FOGRMA penalties were being assessed "for continuous disregard of orders," 4/ he did file his "Notice of Appeal of Decisions."

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4/ The use of the phrase "continuous disregard of orders" by BLM appears to have been drawn from the language of 43 CFR 3163.4 (1983) which stated: "Normally, a penalty would only be assessed for violations involving serious threats to health, safety, property, or the environment, or for continuous disregard of orders." This language was dropped from the regulations in the Department's final rulemaking published in the Federal Register on Sept. 1, 1984. 49 FR 37361, 37367. That rulemaking established the bifurcation of civil penalties into Mineral Leasing Act penalties and FOGRMA penalties. See 43 CFR 3163.4-1 (1984), a distinction which has since been dropped. See note 6, infra.

Although none of BLM's notices or orders identified a specific statutory or regulatory provision or lease or permit term which was being violated, there is no evidence Perlman was ever confused about the reason for the order. 5/ The required action was designed to eliminate the potential for meter malfunction and inaccuracy in meter readings. The application for permit to drill for each of the wells involved in this appeal contains stipulations relating to production facilities. Those stipulations require meter accuracy.

Contrary to Perlman's argument, 43 CFR 3163.4-1(b) (1984) was applicable. 6/ For continued noncompliance with BLM's order to eliminate low spots in meter hoses in order to ensure the accuracy of meter readings, BLM properly imposed FOGRMA penalties.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Bruce R. Harris
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

John H. Kelly Administrative Judge

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5/ The best procedure for BLM to follow in issuing notices and orders under 43 CFR Subpart 3163 would be to identify with specificity the basis for its action, including a citation to the appropriate requirement being violated. 6/ The final regulations published in the Federal Register on Feb. 20, 1987, essentially retain the language of 43 CFR 3163.4-1(b) as the new 43 CFR 3163.2(a), under the heading Civil Penalties. 52 FR 5384, 5393.